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December 23, 2004

VIA MESSENGER

Cathlene Hanaman, Legislative Attorney
Legislative Reference Bureau
One East Main, Suite 200
Madison, WI 53703

Re: Probate Trailer Bill LRB-0135P3

Dear Cathlene:

I enclose the comments from the Real Property, Probate and Trust Section of the State Bar to the December 21, 2004 draft of the Probate Trailer Bill.

As Professor Erlanger asked in his recent e-mail, we would appreciate it if you would review the Committee Note to Wis. Stat. §854.20(5) and let us know whether it correctly captures the LRB view of the meaning of the statute:

Committee Note:

Sub. (5) provides that the rules as stated above are merely default rules. The substance of this provision is unchanged from the former statute. It is important to note that for this statute – as for all others in Chapter 854 where contrary intent applies – the person who executed the governing instrument may have had a contrary intent regarding only part of the statute. Thus the provision can be read to state, “If the transfer is made under a governing instrument and the person who executed the instrument had a contrary intent regarding this section or any of its subparts, the section or subpart does not apply to the transfer. Extrinsic evidence may be used to construe that intent.”

Consider the following examples under s. 854.20(2)(am)

1. A and B are birth parents of a nonmarital child, C. A dies, and B's new partner adopts C. A's parent provides for a transfer at death to his or her “grandchildren,” and sufficient evidence exists to show that A's parent meant to include C as a

Cathlene Hanaman
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grandchild. Under sub. (5), the general provision of (2)(am) would be negated, and C would take as a grandchild.

2. A and B are birth parents of a marital child, C. A dies, and B's new spouse adopts C at a young age. A's parent provides for a transfer at death to his or her "grandchildren," and sufficient evidence exists to show that A's parent did not intend to include C as a grandchild. Under sub. (5), the exception of (2)(am)2.a. would be negated, the general provision of (2)(am) would apply, and C would not take.

We are happy with the language of Wis. Stat. §854.20(5) as long as it does what the Committee Notes states that it does. We will defer to the Legislative Reference Bureau on how to draft this section to obtain the desired result.

Again, we plan to have this bill introduced in January, 2005. We hope to have all the proposed changes made prior to year end.

Thank you so much for all of your help in this matter. Please call me if you have any questions.

Sincerely,

Boardman, Suhr, Curry & Field LLP

By


Elizabeth A. Heiner

EAH/jan
Enclosure
cc: Professor Howard Erlanger
Attorney Dave Reinecke

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PRELIMINARY DRAFT - NOT READY FOR INTRODUCTION

December 21, 2004

1 **AN ACT** *to repeal* 854.03 (7), 854.06 (1) (b), 854.13 (7) (b), 854.13 (11) (title),
2 854.14 (1), 854.21 (1) (a) 1., 2. and 3., 861.04 (2), 861.21 (3), 861.31 (1c), 861.33
3 (1) (c) and 861.35 (1c); *to renumber* 701.115 (1), 766.62 (4), 853.32 (1) and
4 854.13 (2) (a); *to renumber and amend* 701.24, 701.26, 705.04 (2), 766.31 (3),
5 766.31 (6), 852.01 (1) (a) 2., 853.03 (2), 853.11 (2), 853.32 (2) (b), 854.01, 854.05
6 (5), 854.06 (4) (a), 854.08 (5), 854.13 (7) (a), 854.13 (11) (a), 854.13 (11) (b),
7 854.15 (1) (e), 854.20 (1), 854.20 (2) (intro.), 854.20 (2) (a), 854.20 (2) (b), 854.20
8 (3), 854.20 (4), 854.21 (1) (a) (intro.), 857.03 (2) and 861.01 (3); *to amend* 30.541
9 (3) (d) 2. d., 40.02 (8) (a) 2., 71.05 (6) (a) 16., 71.05 (6) (b) 12., 71.05 (12) (d),
10 101.9211 (4) (b) 4., 342.17 (4) (b) 4., 700.11 (1), 700.13 (2), 701.115 (2), 701.115
11 (3), 701.20 (5) (d), 701.24 (title), 701.26 (title), 702.03 (1), 702.08, 705.06 (1) (c),
12 705.06 (2), 705.21 (12) (a), 705.27, 766.61 (7), 766.62 (2), 766.62 (5) (intro.),
13 767.266 (1) (b), 851.21 (1) (b), 851.31, 851.50, 852.01 (1) (b), 852.12, 853.11 (3),
14 853.11 (6) (c), 853.11 (6) (d), 853.18 (1), 853.32 (2) (a), 854.03 (2) (b), 854.03 (5)
15 (d), 854.04 (1) (a), 854.04 (5) (intro.), 854.06 (4) (b), 854.07 (3), 854.08 (6) (a) 1.,

854.08 (6) (a) 2., 854.09 (3), 854.13 (title), 854.13 (2) (h), 854.13 (8), 854.13 (9),
854.13 (10), 854.13 (12) (b), 854.14 (5) (a), 854.14 (5) (b), 854.14 (5) (c), 854.17,
854.18 (1) (a) (intro.), 854.18 (3), 854.20 (5), 854.21 (1) (b), 856.05 (5), 856.15 (1),
856.17, 859.01, subchapter II (title) of chapter 861 [precedes 861.018], 861.02
(title), 861.02 (4), 861.02 (6), 861.02 (7) (b), 861.05 (1) (c), 861.05 (2) (title),
861.06 (title), 861.06 (2) (title), 861.06 (2) (b) (intro.), 861.06 (2) (b) 4. a., 861.07
(2) (intro.), 861.10 (1), 861.10 (2), 861.11 (2) (a) (intro.), 861.11 (2) (b), 861.11 (5)
(b), 861.17 (3), 861.21 (1) (a), 861.21 (2), 861.21 (4), 861.21 (5), 861.31 (1m),
861.31 (2), 861.31 (4) (intro.), 861.31 (4) (a), 861.33 (title), 861.33 (1) (a) (intro.),
861.33 (1) (b), 861.33 (2), 861.33 (3), 861.33 (4), 861.35 (title), 861.35 (1m)
(intro.), 861.35 (1m) (a), 861.35 (1m) (b), 861.35 (1m) (c), 861.35 (2), 861.35 (3)
(a), 861.35 (4) (intro.), 861.35 (4) (a), 863.08, 863.15, 865.07 (1) (d), 867.03 (1g)
(intro.), 867.03 (1g) (b) and 867.035 (1) (a) 4.; **to repeal and recreate** 701.19
(10), 853.04 (3), 854.08 (5) (title), 856.16, 861.02 (8), 863.16 and 863.19; **to**
create 40.18, 700.27, 701.115 (1) (a), 701.24 (2), 701.26 (1) (d), 701.26 (2), 705.04
(2) (a), 705.04 (2) (d), 705.04 (2) (e), 705.04 (2) (f), 705.21 (12) (am), 766.31 (1)
(title), 766.31 (2) (title), 766.31 (3) (b), 766.31 (4) (title), 766.31 (5) (title), 766.31
(6) (title), 766.31 (6) (b), 766.31 (7) (title), 766.31 (7p) (title), 766.31 (8) (title),
766.31 (9) (title), 766.31 (10) (title), 766.62 (4) (b), 766.62 (4) (c), 851.055 (1m),
852.01 (1) (a) 2. b., 853.03 (2) (bm), 853.11 (2m), 853.32 (1) (bm), 853.32 (2) (am),
854.01 (1), 854.03 (5) (g), 854.03 (5) (h), 854.03 (5) (i), 854.03 (5) (j), 854.035,
854.06 (4) (am), 854.08 (5) (a), 854.08 (5) (d), 854.115, 854.12, 854.13 (2) (a) 1.,
854.13 (2) (gm), 854.13 (2) (i), 854.13 (11g) (d), 854.14 (3m), 854.20 (2) (am) 2.
b. and c., 857.03 (2m), 859.02 (2m), 861.01 (3m), 861.01 (4), 861.01 (5), 861.04
(2m), 861.05 (1) (e), 861.05 (2m), 861.06 (6), 880.61 (11m) and 880.675 (1m) of

1 the statutes; and **to affect** 1997 Wisconsin Act 188, section 233 (1); **relating**
2 **to:** miscellaneous remedial modifications to the Wisconsin Probate Code.

Analysis by the Legislative Reference Bureau

This bill makes remedial modifications to current law and primarily corrects technical errors and clarifies various provisions in 1997 Wisconsin Act 188, which modernized the Wisconsin Probate Code. This bill continues the process of extending various interpretative rules from probate to nonprobate assets and of allowing extrinsic evidence to be used when interpreting the intent of the transferor, especially with respect to rules of construction. This bill also creates additional protections for a decedent spouse who is murdered by the surviving spouse.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

3 **SECTION 1.** 30.541 (3) (d) 2. d. of the statutes is amended to read:

4 30.541 (3) (d) 2. d. The limit in subd. 2. c. does not apply if the surviving spouse
5 proceeds under s. 867.03 (1g) and the total value of the decedent's ~~solely owned~~
6 property subject to administration in the state, including boats transferred under
7 this subdivision, does not exceed \$20,000 \$50,000.

8 **SECTION 2.** 40.02 (8) (a) 2. of the statutes is amended to read:

9 40.02 (8) (a) 2. In the absence of a written designation of beneficiary, or if all
10 beneficiaries so designated die before filing with the department an application for
11 any death benefit payable, the person determined in the following sequence: group
12 1, widow or widower; group 2, ~~children if at least one child survives the participant,~~
13 ~~employee or annuitant, in which event the share of any deceased child shall be~~
14 ~~payable to the surviving spouse of the child or to the surviving children of the child~~
15 ~~if there is no spouse, or otherwise to the other eligible children in this group;~~ group
16 3, ~~grandchild;~~ group 4, parent; group 5, brother and sister issue, as defined in s.

1 851.13, per stirpes, as described in s. 854.04 (1). No payment may be made to a person
2 included in any group 2 if there is a living person in ~~any preceding~~ group 1.

3 SECTION 3. 40.18 of the statutes is created to read:

4 **40.18 Applicability of other statutes. (1) MARITAL PROPERTY RIGHTS.**
5 Chapter 766 applies to ownership rights and remedies of a spouse in benefits
6 provided under this chapter.

7 **(2) TRANSFERS AT DEATH.** Chapter 854 applies to transfers at death under this
8 chapter.

9 **(3) DEFERRED MARITAL PROPERTY ELECTION.** Sections 861.018 to 861.10 apply to
10 the election rights of a surviving spouse in benefits provided under this chapter.

11 SECTION 4. 71.05 (6) (a) 16. of the statutes is amended to read:

12 71.05 **(6)** (a) 16. Any amount recognized as a loss under section 1001 (c) of the
13 ~~internal revenue code~~ Internal Revenue Code if a surviving spouse and a distributee
14 exchange their interests in marital property under s. ~~857.03 (2)~~ 766.31 (3) (b).

15 SECTION 5. 71.05 (6) (b) 12. of the statutes is amended to read:

16 71.05 **(6)** (b) 12. Any amount recognized as a gain under section 1001 (c) of the
17 ~~internal revenue code~~ Internal Revenue Code if a surviving spouse and a distributee
18 exchange their interests in marital property under s. ~~857.03 (2)~~ 766.31 (3) (b).

19 SECTION 6. 71.05 (12) (d) of the statutes is amended to read:

20 71.05 **(12)** (d) Property exchanged under s. ~~857.03 (2)~~ 766.31 (3) (b) shall be
21 treated as if acquired by gift for the determination of basis.

22 SECTION 7. 101.9211 (4) (b) 4. of the statutes is amended to read:

23 101.9211 **(4)** (b) 4. The limit in subd. 3. does not apply if the surviving spouse
24 is proceeding under s. 867.03 (1g) and the total value of the decedent's ~~solely owned~~

December 22, 2004

Change for 700.13, replacing SECTION 10 in 05-0135/P3

700.13 (2) of the statutes is repealed and recreated to read:

700.13 (2) The effect of a renunciation or release of an interest for life or years is as provided in sections 700.27 (8) and 854.13 (10).

1 property subject to administration in the state, including the manufactured homes
2 transferred under this paragraph, does not exceed \$10,000 \$50,000.

3 **SECTION 8.** 342.17 (4) (b) 4. of the statutes is amended to read:

4 342.17 (4) (b) 4. The limit in subd. 3. does not apply if the surviving spouse is
5 proceeding under s. 867.03 (1g) and the total value of the decedent's ~~solely-owned~~
6 property subject to administration in the state, including the vehicles transferred
7 under this paragraph, does not exceed ~~\$20,000~~ \$50,000.

8 **SECTION 9.** 700.11 (1) of the statutes is amended to read:

9 700.11 (1) If a statute, inter vivos governing instrument, as defined in s. 700.27
10 (1) (c), or governing instrument, as defined in s. 854.01 (2), specifies that property
11 is to be distributed to, or a future interest is to be created in, a designated individual's
12 "heirs", "heirs at law", "next of kin", "relatives" ~~or~~, "family," or a term that has
13 a similar meaning, or if a class gift in favor of "descendants", "issue," or "heirs of the
14 body" does not specify the manner in which the property is to be distributed among
15 the class members, the property is distributed according to s. 854.22.

16 **SECTION 10.** 700.13 (2) of the statutes is amended to read:

17 700.13 (2) Unless the instrument of transfer manifests a contrary intent, either
18 expressly or as construed from extrinsic evidence, renunciation or release of an
19 interest for life or years accelerates succeeding interests. Sections 700.27 (8) and
20 854.13 (10) govern acceleration of a succeeding interest upon disclaimer of a
21 preceding interest.

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22 **SECTION 11.** 700.27 of the statutes is created to read:

23 **700.27 Disclaimer of transfers during life. (1) DEFINITIONS.** In this section:

1 (a) "Beneficiary under an inter vivos governing instrument" includes any
2 person who receives or might receive property under the terms or legal effect of an
3 inter vivos governing instrument.

4 (b) "Extrinsic evidence" has the meaning given in s. 854.01 (1).

5 (c) "Inter vivos governing instrument":
6

1. Means a gratuitous deed, inter vivos trust instrument, insurance policy,
7 contract, inter vivos instrument that creates or exercises a power of appointment, or
8 any other dispositive, appointive, or nominative instrument that transfers property
9 other than a governing instrument as defined in s. 854.01 (2).

10 2. Includes an inter vivos gift that is not subject to a written instrument.

11 (d) "Power" has the meaning given in s. 702.01 (4).

12 (2) RIGHT TO DISCLAIM. (a) *In general.* 1. In this paragraph, "person" includes
13 a person who is unborn or unascertained.

14 2. A person who is a recipient of property or beneficiary under an inter vivos
15 governing instrument, donee of a power created by an inter vivos governing
16 instrument, appointee under a power exercised by an inter vivos governing
17 instrument, taker in default under a power created by an inter vivos governing
18 instrument, or person succeeding to disclaimed property created by an inter vivos
19 governing instrument may disclaim any property, including contingent or future
20 interests or the right to receive discretionary distributions, by delivering a written
21 instrument of disclaimer under this section.

22 (b) *Partial disclaimer.* Property transferred under an inter vivos governing
23 instrument may be disclaimed in whole or in part, except that a partial disclaimer
24 of property passing by an inter vivos governing instrument or by the exercise of a

1 power may not be made if partial disclaimer is expressly prohibited by the inter vivos
2 governing instrument or by the instrument exercising the power.

3 (c) *Spendthrift provision.* The right to disclaim exists notwithstanding any
4 limitation on the interest of the disclaimant in the nature of a spendthrift provision
5 or similar restriction.

6 (d) *Disclaimer by a guardian or conservator.* A guardian of the estate or a
7 conservator appointed under ch. 880 may disclaim on behalf of his or her ward, with
8 court approval, if the ward is entitled to disclaim under this section.

9 (e) *Disclaimer by an agent under power of attorney.* An agent under a power
10 of attorney may disclaim on behalf of the person who granted the power of attorney
11 if all of the following apply:

12 1. The person who granted the power of attorney is entitled to disclaim under
13 this section.

14 2. The power of attorney specifically grants the power to disclaim.

15 (f) *Disclaimer by trustee.* The trustee of a trust named as a recipient of property
16 under an inter vivos governing instrument may disclaim that property on behalf of
17 the trust if the ^{trust} governing instrument authorizes disclaimer by the trustee. If the
18 ^{trust} governing instrument does not authorize disclaimer by the trustee, the trustee's
19 power to disclaim is subject to the approval of the court.

20 (g) *After death.* A person's right to disclaim survives the person's death and
21 may be exercised by the person's personal representative or special administrator
22 upon receiving approval from the court having jurisdiction of the person's estate after
23 hearing upon notice to all persons interested in the disclaimed property, if the
24 personal representative or special administrator has not taken any action ^{which} ~~that~~ would
25 bar the right to disclaim ^{under sub. (9).}

(Just trying to keep this parallel to
854.13(h))

1 (h) *Disclaimers of transfers at death.* A person who is a recipient of property
2 under a governing instrument, as defined in s. 854.01 (2), may disclaim ~~such~~ *the*
3 property as provided in s. 854.13.

4 (3) INSTRUMENT OF DISCLAIMER. The instrument of disclaimer must meet the
5 provisions of subs. (4) and (5) and s. 854.13 (3) (a) to (c).

6 (4) TIME FOR EFFECTIVE DISCLAIMER. (a) *Present interest.* An instrument
7 disclaiming a present interest shall be executed and delivered not later than 9
8 months after the effective date of the transfer under the inter vivos governing
9 instrument. For cause shown, the period may be extended by a court of competent
10 jurisdiction, either within or after the 9-month period, for such additional time as
11 the court considers just.

12 (b) *Future interest.* An instrument disclaiming a future interest shall be
13 executed and delivered not later than 9 months after the event that determines that
14 the taker of the property is finally ascertained and his or her interest indefeasibly
15 fixed. For cause shown, the period may be extended by a court of competent
16 jurisdiction, either within or after the 9-month period, for such additional time as
17 the court considers just.

18 (c) *Future right to income or profits.* Notwithstanding pars. (a) and (b), an
19 instrument disclaiming the future right to receive mandatory distributions of
20 income or profits from any source may be executed and delivered at any time.

21 (d) *Persons under 21.* Notwithstanding pars. (a) and (b), a person under 21
22 years of age may disclaim at any time not later than 9 months after the date on which
23 the person attains 21 years of age.

24 (e) *Interests arising by disclaimer.* Notwithstanding pars. (a) and (b), a person
25 whose interest in property arises by disclaimer or by default of exercise of a power

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Further changes for 700.27 - replacing (7) and (8) of Section 11 of 05-0135/P3

Please note that I changed the title and added sub-titles in 700.27(7). Section (a) is the current text in LRB-0135P3. Sections (b) and (c) are additions.

700.27(7) DEVOLUTION. (a) *In general.* Subject to sub. (8), unless the inter vivos governing instrument provides otherwise, either expressly or as construed from extrinsic evidence, the disclaimed property devolves as if the disclaimant had died before the effective date of the transfer under the inter vivos governing instrument. If the disclaimant is an appointee under a power exercised by an inter vivos governing instrument, the disclaimed property devolves as if the disclaimant had died before the effective date of the exercise of the power. If the disclaimant is a taker in default under a power created by an inter vivos governing instrument, the disclaimed property devolves as if the disclaimant had predeceased the donee of the power.

(b) *Devolution to descendants of the disclaimants.* Unless the inter vivos governing instrument provides otherwise, either expressly or as construed from extrinsic evidence, if, by law or under the inter vivos governing instrument, the descendants of the disclaimant would share in the disclaimed interest by any method of representation had the disclaimant died before the time the disclaimed interest would have taken effect in possession or enjoyment, the disclaimed interest passes only to the descendants of the disclaimant who survive when the disclaimed interest takes effect in possession or enjoyment.

(c) *Applicable to present and future interests.* This section applies to the disclaimer of present interests and future interests.

These changes are parallel to the changes going through for 854.13(10).

(8) ACCELERATION OF SUBSEQUENT INTERESTS WHEN PRECEDING INTEREST IS DISCLAIMED. (a) *Subsequent interest not held by disclaimant.* Unless the inter vivos governing instrument provides otherwise, either expressly or as construed from extrinsic evidence, upon the disclaimer of a preceding interest, a subsequent interest not held by the disclaimant and limited to take effect in possession or enjoyment after the termination of the interest that is disclaimed accelerates to take effect as if the disclaimant had died immediately before the time when the disclaimed interest would have taken effect in possession or enjoyment or, if the disclaimant is an appointee under a power exercised by a power of appointment, as if the disclaimant had died before the effective date of the exercise of the power.

(b) *Subsequent interest held by disclaimant.* Unless the inter vivos governing instrument provides otherwise, either expressly or as construed from extrinsic evidence, upon the disclaimer of a preceding interest, a subsequent interest held by the disclaimant does not accelerate.

1 created by an inter vivos governing instrument may disclaim at any time not later
2 than 9 months after the day on which the prior instrument of disclaimer is delivered,
3 or the date on which the donee's power lapses.

4 **(5) DELIVERY AND FILING OF DISCLAIMER.** (a) *Delivery.* In addition to any
5 requirements imposed by the inter vivos governing instrument, the instrument of
6 disclaimer is effective only if, within the time specified under sub. (4), it is delivered
7 to and received by any of the following:

- 8 1. The transferor of the property disclaimed.
- 9 2. The transferor's legal representative.
- 10 3. The holder of legal title to the property.

11 (b) *Delivery to trustee.* If the trustee of any trust to which the interest or power
12 relates does not receive the instrument of disclaimer under par. (a), a copy shall also
13 be delivered to the trustee. Failure to deliver a copy of the instrument of disclaimer
14 to the trustee within the time specified under sub. (4) does not affect the validity of
15 any disclaimer.

16 (c) *Recording.* If real property or an interest in real property is disclaimed, a
17 copy of the instrument of disclaimer may be recorded in the office of the register of
18 deeds of the county in which the real estate is situated.

19 **(6) PROPERTY NOT VESTED.** The property disclaimed under this section shall be
20 considered not to have been vested in, created in, or transferred to the disclaimant.

21 **(7) DEVOLUTION IN GENERAL.** Subject to sub. (8), unless the inter vivos governing
22 instrument provides otherwise, either expressly or as construed from extrinsic
23 evidence, the disclaimed property devolves as if the disclaimant had died before the
24 effective date of the transfer under the inter vivos governing instrument. If the
25 disclaimant is an appointee under a power exercised by an inter vivos governing

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1 instrument, the disclaimed property devolves as if the disclaimant had died before
2 the effective date of the exercise of the power. If the disclaimant is a taker in default
3 under a power created by an inter vivos governing instrument, the disclaimed
4 property devolves as if the disclaimant had predeceased the donee of the power.

5 ~~(8) DEVOLUTION OF DISCLAIMED FUTURE INTEREST.~~ (a) *Future interest held by a*
6 *person other than the disclaimant.* Unless the inter vivos governing instrument
7 provides otherwise, either expressly or as construed from extrinsic evidence, upon
8 the disclaimer of a preceding interest, a future interest held by a person other than
9 the disclaimant takes effect as if the disclaimant had died immediately before the
10 time of distribution or, if the disclaimant is an appointee under a power exercised by
11 a power of appointment, as if the disclaimant had died before the effective date of the
12 exercise of power.

13 (b) *Future interest held by the disclaimant.* A future interest held by the
14 disclaimant takes effect as described in par. (a) unless the court determines that
15 acceleration would contradict the donor's probable intent.

16 (9) BAR. Actions that bar disclaimer are as provided in s. 854.13 (11g).

17 ^{OR WAIVER,} (10) EFFECT OF DISCLAIMER. The effect of the disclaimer on the disclaimant and
18 any successors in interest is as provided in s. 854.13 (11p).

19 (11) NONEXCLUSIVENESS OF REMEDY. (a) This section does not affect the right of
20 a person to waive, release, disclaim, or renounce property under any other statute,
21 or the common law, or as provided in the ^{creating} ~~inter vivos governing~~ instrument.

22 (b) Any disclaimer that meets the requirements of section 2518 of the Internal
23 Revenue Code ^{the requirements} or of any other federal law relating to disclaimers, constitutes an
24 effective disclaimer under this section or s. 854.13.

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(Just trying to keep this parallel with
854.13 (12))

*New addition to
HBB 05 0135 P3*

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Proposed addition of (b), (c) and (d) to 701.06 ^(u) to assure that spendthrift trusts do not lose spendthrift protection (1) because a beneficiary has allowed a limited power of withdrawal or power of appointment to lapse or (2) because the trustee also is a beneficiary of the trust, so long as the authority to make distributions to a beneficiary is limited or is only exercisable at death.

The proposed amendment retains the text of the original 701.06(6) as (a) and adds (b), (c), and (d).

701.06 Spendthrift provisions and rights of creditors of beneficiaries.

(6) Settlor as beneficiary. **(a)** Notwithstanding any provision in the creating instrument and in addition to the remedies available under subs. (4) and (5) where the settlor is a beneficiary, upon application of a judgment creditor of the settlor, the court may, if the terms of the instrument require or authorize the trustee to make payments of income or principal to or for the benefit of the settlor, order the trustee to satisfy part or all of the judgment out of part or all of the payments of income or principal as they are due, presently or in the future, or which are payable in the trustee's discretion, to the extent in either case of the settlor's proportionate contribution to the trust.

(b) A beneficiary of the trust may not be considered a settlor merely because of a lapse, waiver, or release of:

1. a power described by par. (c); or
2. the beneficiary's right to withdraw part of the trust property, to the extent that the value of the property affected by the lapse, waiver, or release in any calendar year does not exceed the greater of the amount specified in:
 - a. Section 2041(b)(2) or 2514(e), Internal Revenue Code of 1986; or
 - b. Section 2503(b), Internal Revenue Code of 1986.

(c) A beneficiary of the trust may not be considered to be a settlor, to have made a voluntary or involuntary transfer of the beneficiary's interest in the trust, or to have the power to make a voluntary or involuntary transfer of the beneficiary's interest in the trust, merely because the beneficiary, in any capacity, holds or exercises:

1. a presently exercisable power to consume, invade, appropriate, or distribute property to or for the benefit of the beneficiary, if the power is:
 - a. exercisable only on consent of another person holding an interest adverse to the beneficiary's interest; or
 - b. limited by an ascertainable standard, such as health, education, support, or maintenance of the beneficiary;

2. a presently exercisable power to appoint any property of the trust to or for the benefit of a person other than the beneficiary, a creditor of the beneficiary, the beneficiary's estate, or a creditor of the beneficiary's estate;
 3. a testamentary power of appointment; or
 4. a presently exercisable right described by par. (b)(2).
- (d) A beneficiary of the trust may not be considered a settlor merely because the beneficiary is entitled to nondiscretionary distributions from the trust.

Committee Note

This change clarifies existing law to assure that spendthrift trusts do not lose spendthrift protection (1) because a beneficiary has allowed a limited power of withdrawal or power of appointment to lapse or (2) because the trustee also is a beneficiary of the trust, so long as the authority to make distributions to a beneficiary is limited or is only exercisable at death. The change is modeled on a proposed change to Texas s. 112.035 and is in response to an interpretation in Section 60 of the Restatement, Third, of Trusts, which calls into question the protection from creditors of a spendthrift trust when the trustee also is a beneficiary of the trust, even if the trustee's authority to make distributions is limited to an ascertainable standard.

This amendment is meant to clarify existing law. It is considered a remedial modification and should not be included in Section 217, the Initial Applicability Section. However, it is

treated like 701.19 (10) and included in 701.24. (2).

1 **(12)** CONSTRUCTION OF EFFECTIVE DATE. In this section, the effective date of a
2 transfer under an inter vivos governing instrument is the date on which the transfer
3 is a completed gift for federal gift tax purposes.

4 **SECTION 12.** 701.115 (1) of the statutes is renumbered 701.115 (1) (b).

5 **SECTION 13.** 701.115 (1) (a) of the statutes is created to read:

6 701.115 **(1)** (a) In par. (b), “revocable trust” means a trust that the grantor, at
7 the time of death, was alone empowered to change or revoke, by law or under the
8 instrument creating the trust, regardless of whether the grantor then had the
9 capacity to exercise the power.

10 **SECTION 14.** 701.115 (2) of the statutes is amended to read:

11 701.115 **(2)** Survivorship under sub. (1) (b) is governed by s. 854.03.

12 **SECTION 15.** 701.115 (3) of the statutes is amended to read:

13 701.115 **(3)** The rights of the issue of a predeceasing beneficiary under sub. (1)
14 (b) are governed by s. 854.06.

15 **SECTION 16.** 701.19 (10) of the statutes is repealed and recreated to read:

16 701.19 **(10)** RESTRICTION ON EXERCISE OF POWERS. (a) Except as provided in par.
17 (c), a person may not exercise any of the following powers conferred upon him or her
18 in his or her capacity as trustee:

19 1. The power to make discretionary distributions of trust principal or income
20 if the distributions are to himself or herself or for the discharge of his or her legal
21 obligations.

22 2. The power to make discretionary allocations of receipts or expenses as
23 between principal and income if the allocations are in his or her favor.

24 (b) If a power under par. (a) is conferred upon more than one person as trustee,
25 a person who is not disqualified to act under par. (a) may exercise the power for the

*See attached
sheet
re:
701.06 (6)*

1 benefit of the person who is disqualified to act, unless the creating instrument
2 expressly provides otherwise. A special trustee appointed by a court may exercise
3 a power under par. (a) for the benefit of the disqualified person if no other trustee is
4 qualified to exercise the power.

5 (c) Paragraph (a) does not apply if any of the following applies:

6 1. The person is also the settlor of the trust, and the trust may be revoked or
7 amended by the settlor.

8 2. The terms of the creating instrument specifically limit the scope of the power
9 to expenditures and distributions of income or principal on the basis of an
10 ascertainable standard relating to the person's health, maintenance, support, or
11 education such that the person would not be subject to tax under section 2041 or 2514
12 of the Internal Revenue Code as a result of having or exercising the power.

13 3. The person is the spouse, widow, or widower of the settlor of the trust, and
14 a marital deduction has been allowed for federal gift or estate tax purposes with
15 respect to the trust property that is subject to the power.

16 4. The creating instrument negates the application of par. (a) with respect to
17 the power or indicates that provisions that are similar to par. (a) do not apply.

18 (d) Section 701.24 (2) governs the applicability of this statute.

19 **SECTION 17.** 701.20 (5) (d) of the statutes is amended to read:

20 701.20 (5) (d) A legatee, including a trustee, of a specific amount of money not
21 determined by a pecuniary formula shall not be paid any part of the income of the
22 estate but shall receive interest on any unpaid portion of the legacy for the period
23 commencing one year after decedent's death at the legal rate set forth in s. 138.04.
24 For purposes of this paragraph, the deferred marital property elective share amount

1 elected by a surviving spouse under s. 861.02 (1) is a bequest of a specific amount of
2 money not determined by a pecuniary formula.

3 **SECTION 18.** 701.24 (title) of the statutes is amended to read:

4 **701.24 (title) Applicability of ss. 701.01 to 701.23.**

5 **SECTION 19.** 701.24 of the statutes is renumbered 701.24 (1) and amended to
6 read:

7 701.24 (1) Except as otherwise provided in sub. (2) and s. 701.19 (9) (a) and (10),
8 ss. 701.01 to 701.23 are applicable to a trust existing on July 1, 1971, as well as a trust
9 created after such date, and shall govern trustees acting under such trusts. If
10 application of any provision of ss. 701.01 to 701.23 to a trust in existence on August
11 1, 1971, is unconstitutional, it shall not affect application of the provision to a trust
12 created after that date.

13 **SECTION 20.** 701.24 (2) of the statutes is created to read:

14 701.24 (2) Section 701.19 (10) ^{701.06(b)(b), (c), and (d) and s.} is applicable to a trust existing on the effective
15 date of this subsection [revisor inserts date], as well as a trust created after that
16 date, and shall govern trustees acting under such trusts. If application of any
17 provision of ^{are} s. 701.19 (10) ^{(s. 701.06(b)(b), (c), and (d) or} to a trust in existence on the effective date of this
18 subsection [revisor inserts date], is unconstitutional, it shall not affect application
19 of the provision to a trust created after that date.

20 **SECTION 21.** 701.26 (title) of the statutes is amended to read:

21 **701.26 (title) Disclaimers of nonprobate transfers at death.**

22 **SECTION 22.** 701.26 of the statutes is renumbered 701.26 (1) and amended to
23 read:

24 701.26 (1) A ~~person~~ recipient may disclaim, under s. 854.13, any of the
25 following:

1 (a) ~~An All or part of an~~ interest in a joint tenancy, upon the death of another
2 joint tenant.

3 (b) ~~An All or part of an~~ interest in survivorship marital property, upon the death
4 of the other spouse.

5 (c) ~~An All or part of an~~ interest that is created by a nontestamentary instrument
6 and transferred at death, upon the death that causes the transfer.

7 **SECTION 23.** 701.26 (1) (d) of the statutes is created to read:

8 701.26 (1) (d) All or part of any other interest transferred under a governing
9 instrument, as defined in s. 854.01 (2).

10 **SECTION 24.** 701.26 (2) of the statutes is created to read:

11 701.26 (2) A recipient may disclaim, under s. 700.27, all or part of any interest
12 transferred under an inter vivos governing instrument, as defined in s. 700.27 (1) (c).

13 **SECTION 25.** 702.03 (1) of the statutes is amended to read:

14 702.03 (1) ~~Unless the person who executed it had a contrary intention is found,~~
15 if a governing instrument, as defined in s. 854.01 (2), ~~or an inter vivos governing~~
16 ~~instrument, as defined in s. 700.27 (1) (c),~~ creating a power of appointment expressly
17 requires that the power be exercised by any type of reference to the power or its
18 source, ~~it is presumed that the donor's intention in requiring the reference was is~~
19 ~~presumed to be~~ to prevent an inadvertent exercise of the power. Extrinsic evidence
20 may be used to show contrary intent.

21 **SECTION 26.** 702.08 of the statutes is amended to read:

22 **702.08 Disclaimer of powers.** The donee of any power may disclaim all or
23 part of the power as provided under s. 700.27 or 854.13.

24 **SECTION 27.** 705.04 (2) of the statutes is renumbered 705.04 (2) (intro.) and
25 amended to read:

1 705.04 (2) (intro.) If the account is a P.O.D. account, on the death of the original
2 payee or the survivor of 2 or more original payees, ~~any sums remaining on deposit~~
3 ~~belong to the P.O.D. beneficiaries if surviving, or to the survivor of them if one or more~~
4 ~~die before the original payee. Payment may be made to a minor P.O.D. beneficiary,~~
5 ~~however, only in accordance with a procedure approved in ch. 880. all of the following~~
6 ~~apply:~~

7 (b) If there are 2 or more P.O.D. beneficiaries and they all survive, they shall
8 ~~be are entitled to payment of the sums on deposit in accordance with such any written~~
9 ~~instructions as may have been that the owner filed with the financial institution, and~~
10 ~~or, if none the owner left no written instructions, to payment in equal shares. There~~

11 (c) If 2 or more persons succeed to ownership of the account, there is no further
12 ~~right of survivorship in the event of the death of one of 2 or more P.O.D. beneficiaries~~
13 ~~after their entitlement to payment has matured unless the terms of the account~~
14 ~~expressly provide for survivorship or for the account's continuance as a joint account.~~

15 **SECTION 28.** 705.04 (2) (a) of the statutes is created to read:

16 705.04 (2) (a) If there is one P.O.D. beneficiary and he or she survives, he or she
17 is entitled to payment of all sums remaining on deposit.

18 **SECTION 29.** 705.04 (2) (d) of the statutes is created to read:

19 705.04 (2) (d) Subject to the rights of financial institutions under s. 705.06 (1)
20 (c), if any P.O.D. beneficiary predeceases the original payee or the survivor of 2 or
21 more original payees, the amount to which the predeceased P.O.D. beneficiary would
22 have been entitled passes to any of his or her issue who would take under s. 854.06
23 (3).

24 **SECTION 30.** 705.04 (2) (e) of the statutes is created to read:

1 705.04 (2) (e) If no P.O.D. beneficiary or predeceased P.O.D. beneficiary's issue
2 who would take under s. 854.06 (3) survives the death of all owners, the account
3 belongs to the estate of the deceased sole owner or the estate of the last to die of
4 multiple owners.

5 **SECTION 31.** 705.04 (2) (f) of the statutes is created to read:

6 705.04 (2) (f) Payment may be made to a minor P.O.D. beneficiary only in
7 accordance with a procedure approved under ch. 880.

8 **SECTION 32.** 705.06 (1) (c) of the statutes is amended to read:

9 705.06 (1) (c) Any sums in a P.O.D. account may be paid, on request, to the
10 P.O.D. beneficiary upon presentation to the financial institution of proof of death
11 showing that the P.O.D. beneficiary survived all persons named as original payees
12 of the account. If more than one P.O.D. beneficiary is named and at least one of them
13 is predeceased, sums in the account may be paid to the surviving P.O.D. beneficiary
14 or beneficiaries upon presentation of proof of death of the other beneficiary, without
15 regard to claims by the issue of a predeceased beneficiary under s. 705.04 (2) (d). If
16 none of the named beneficiaries survive, the sums in the account may be paid to the
17 estate of the deceased sole owner or the estate of the owner who was the last to die
18 of multiple owners, without regard to claims by the issue of a predeceased beneficiary
19 under s. 705.04 (2) (d).

20 **SECTION 33.** 705.06 (2) of the statutes is amended to read:

21 705.06 (2) Payment made under this subchapter discharges the financial
22 institution from all claims for amounts so withdrawn. If the institution has reason
23 to believe that a dispute exists as to the rights of the parties to an account or their
24 successors it may, but shall not be required to, refuse to pay funds in the account to
25 any persons pending instructions from a court, or it may pay the proceeds to a court.

1 An institution may but need not recognize the authority of an agent, other than one
2 with continuing authority under s. 705.05 (3), until it knows of the fact of death or
3 adjudication of incompetence of all parties appointing such agent and has reasonable
4 opportunity to act.

5 **(3)** The protection provided by this section shall have no bearing on the rights
6 of parties or their successors in disputes concerning the beneficial ownership of funds
7 in or withdrawn from an account.

8 **SECTION 34.** 705.21 (12) (a) of the statutes is amended to read:

9 705.21 (12) (a) A reinvestment account associated with a security, a securities
10 account with a broker, a cash balance in a brokerage account, cash, cash equivalents,
11 interest, earnings, or dividends earned or declared on a security in an account, a
12 reinvestment account, or a brokerage account, whether or not credited to the account
13 before the owner's death.

14 **SECTION 35.** 705.21 (12) (am) of the statutes is created to read:

15 705.21 (12) (am) An investment agency, investment management, or custody
16 account with a trust company or a trust division of a bank with trust powers,
17 including the securities in the account, a cash balance in the account, and cash, cash
18 equivalents, interest, earnings, or dividends earned or declared on a security in the
19 account, whether or not credited to the account before the owner's death.

20 **SECTION 36.** 705.27 of the statutes is amended to read:

21 **705.27 Ownership on death of owner.** On death of a sole owner or the last
22 to die of multiple owners, ownership of securities registered in beneficiary form
23 passes to the beneficiary or beneficiaries who survive all owners and to any
24 predeceased beneficiary's issue who would take under s. 854.06 (3). On proof of death
25 of all owners and compliance with any applicable requirements of the registering

1 entity, a security registered in beneficiary form may be reregistered in the name of
2 the ~~beneficiary or beneficiaries who survive the death of all owners~~ successors to the
3 ownership interest. Until division of the security after the death of all owners,
4 multiple ~~beneficiaries surviving the death of all owners~~ successors to the ownership
5 interest hold their interests as tenants in common. If no beneficiary or predeceased
6 beneficiary's issue who would take under s. 854.06 (3) survives the death of all
7 owners, the security belongs to the estate of the deceased sole owner or the estate of
8 the last to die of multiple owners.

9 **SECTION 37.** 766.31 (1) (title) of the statutes is created to read:

10 766.31 (1) (title) GENERAL.

11 **SECTION 38.** 766.31 (2) (title) of the statutes is created to read:

12 766.31 (2) (title) PRESUMPTION.

13 **SECTION 39.** 766.31 (3) of the statutes is renumbered 766.31 (3) (intro.) and
14 amended to read:

15 766.31 (3) SPOUSE'S INTEREST IN MARITAL PROPERTY. (intro.) Each spouse has a
16 present undivided one-half interest in each item of marital property, ~~but the~~ subject
17 to all of the following:

18 (a) Terminable interest in deferred employment benefit plan. As provided in s.
19 766.62 (5), the marital property interest of the nonemployee spouse in a deferred
20 employment benefit plan or in assets in an individual retirement account that are
21 traceable to the rollover of a deferred employment benefit plan terminates at the
22 death of the nonemployee spouse if he or she predeceases the employee spouse.

23 **SECTION 40.** 766.31 (3) (b) of the statutes is created to read:

24 766.31 (3) (b) *Division based on aggregate value at death*. 1. Spouses may
25 provide in a marital property agreement that at the death of a spouse some or all of

1 their marital property will be divided based on aggregate value rather than divided
2 item by item. However, at the death of a spouse, a marital property agreement is not
3 necessary for a division of marital property that is not item by item.

4 2. The surviving spouse and the successor in interest to the decedent's share
5 of marital property may enter into an agreement providing that some or all of the
6 marital property in which each has an interest will be divided based on aggregate
7 value rather than divided item by item.

8 **SECTION 41.** 766.31 (4) (title) of the statutes is created to read:

9 766.31 (4) (title) CLASSIFICATION OF INCOME.

10 **SECTION 42.** 766.31 (5) (title) of the statutes is created to read:

11 766.31 (5) (title) TRANSFER TO A TRUST.

12 **SECTION 43.** 766.31 (6) (title) of the statutes is created to read:

13 766.31 (6) (title) PROPERTY OWNED AT DETERMINATION DATE.

14 **SECTION 44.** 766.31 (6) of the statutes is renumbered 766.31 (6) (a) and
15 amended to read:

16 766.31 (6) (a) *Date of marriage same as determination date.* Property owned
17 at a ~~If the date of marriage which occurs after 12:01 a.m. on January 1, 1986, is the~~
18 same as the determination date, the property owned at the determination date is
19 individual property of the owning spouse if, ~~at the marriage, both spouses are~~
20 ~~domiciled in this state.~~

21 **SECTION 45.** 766.31 (6) (b) of the statutes is created to read:

22 766.31 (6) (b) *Date of marriage prior to determination date.* If the date of
23 marriage precedes the determination date, the property owned at the determination
24 date is not classified by this chapter but is subject to all of the following:

25 1. Subsections (8) and (9) govern property owned at the time of marriage.

1 2. Subsections (8) and (9) govern property acquired while the spouses were
2 married but before the determination date if the property would have been
3 individual property had it been acquired after the determination date.

4 3. Subsections (8) and (9) and s. 861.02 govern property acquired while the
5 spouses were married but before the determination date if the property would have
6 been marital property had it been acquired after the determination date.

7 **SECTION 46.** 766.31 (7) (title) of the statutes is created to read:

8 766.31 (7) (title) INDIVIDUAL PROPERTY AFTER DETERMINATION DATE.

9 **SECTION 47.** 766.31 (7p) (title) of the statutes is created to read:

10 766.31 (7p) (title) UNILATERAL STATEMENT.

11 **SECTION 48.** 766.31 (8) (title) of the statutes is created to read:

12 766.31 (8) (title) RIGHTS IN PROPERTY ACQUIRED BEFORE DETERMINATION DATE.

13 **SECTION 49.** 766.31 (9) (title) of the statutes is created to read:

14 766.31 (9) (title) TREATMENT OF PROPERTY ACQUIRED BEFORE THE DETERMINATION
15 DATE.

16 **SECTION 50.** 766.31 (10) (title) of the statutes is created to read:

17 766.31 (10) (title) RECLASSIFICATION.

18 **SECTION 51.** 766.61 (7) of the statutes is amended to read:

19 766.61 (7) If Except as provided in s. 854.14 (3m) (b) 2., if a noninsured spouse
20 predeceases an insured spouse, the marital property interest of the decedent spouse
21 in a policy which that designates the surviving spouse as the owner and insured is
22 limited to a dollar amount equal to one-half of the marital property interest in the
23 interpolated terminal reserve and in the unused portion of the term premium of the
24 policy on the date of death of the deceased spouse. All other rights of the decedent
25 spouse in the ownership interest or proceeds of the policy, other than the marital

1 property interest described in this subsection, terminate at the decedent spouse's
2 death.

3 **SECTION 52.** 766.62 (2) of the statutes is amended to read:

4 766.62 (2) A deferred employment benefit attributable to employment of a
5 spouse occurring ~~while the spouse is married and~~ partly before and partly after the
6 determination date is mixed property. The marital property component of that mixed
7 property is the amount which results from multiplying the entire benefit by a
8 fraction, the numerator of which is the period of employment giving rise to the benefit
9 that occurred after the determination date and during marriage and the
10 denominator of which is the total period of employment giving rise to the benefit.

11 **SECTION 53.** 766.62 (4) of the statutes is renumbered 766.62 (4) (a).

12 **SECTION 54.** 766.62 (4) (b) of the statutes is created to read:

13 766.62 (4) (b) If a deferred employment benefit plan administrator has reason
14 to believe that a dispute exists as to the rights of parties, or their successors, to a
15 deferred employment benefit, the deferred employment benefit plan administrator
16 may do any of the following:

- 17 1. Deposit the funds with a court.
- 18 2. Refuse to transfer any funds from the plan to any person until the
19 administrator receives from a court written documentation that the dispute has
20 resolved.

Yes. Thanks. Please integrate the language from 854.23(5)(b), (c) and also sub (4).

****NOTE: You may want to be more specific — see for example ss. 766.61 (2) (c), 854.23 (5) (c), and 861.11 (5) (c). The latter two provisions provide how to deposit property with a court. If you do not want to be that specific perhaps you want to specify that the court should be one with jurisdiction over the proceedings?

21 **SECTION 55.** 766.62 (4) (c) of the statutes is created to read:

22 766.62 (4) (c) The protection afforded a deferred employment benefit plan
23 administrator under this subsection does not affect the rights of parties or their

1 successors in disputes concerning the beneficial ownership of deferred employment
2 benefits.

3 **SECTION 56.** 766.62 (5) (intro.) of the statutes is amended to read:

4 766.62 (5) (intro.) If Except as provided in s. 854.14 (3m) (c), if the nonemployee
5 spouse predeceases the employee spouse, the marital property interest of the
6 nonemployee spouse in all of the following terminates at the death of the
7 nonemployee spouse:

8 **SECTION 57.** 767.266 (1) (b) of the statutes is amended to read:

9 767.266 (1) (b) That one or both spouses will make a particular disposition in
10 a will or other governing instrument, as defined in s. 854.01 (2).

11 **SECTION 58.** 851.055 (1m) of the statutes is created to read:

12 851.055 (1m) Is not classified as individual property or marital property under
13 a valid marital property agreement, unless the marital property agreement provides
14 otherwise.

15 **SECTION 59.** 851.21 (1) (b) of the statutes is amended to read:

16 851.21 (1) (b) ~~A~~ Except as provided in s. 853.32 (2) (e), a beneficiary named in
17 any document offered for probate as the will of the decedent and includes a person
18 named or acting as a trustee of any trust, inter vivos or testamentary, named as a
19 beneficiary.

20 **SECTION 60.** 851.31 of the statutes is amended to read:

21 **851.31 Will.** ~~“Will”~~ Unless the context or subject matter indicates otherwise,
22 “will” includes a codicil and any document incorporated by reference in a
23 testamentary document under s. 853.32 (1) or (2). “Will” does not include a copy,
24 unless the copy has been proven as a will under s. 856.17, but “will” does include a
25 properly executed duplicate original.